IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 62 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAMACHANDRA MALOJIRAO BHONSLE

Versus

RASIKBHAI GOVARDHANBHAI RAIYANI

Appearance:

PARTY-IN-PERSON for Petitioner

MR YOGESH S LAKHANI for Respondent No. 1

MR KC SHAH, LEARNED APP for Respondent No. 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 19/09/2000

ORAL JUDGEMENT

1. The revisionist - party in person has filed this revision challenging the order dated January 12, 2000 passed by 3rd Additional Sessions Judge, Baroda reversing the order of learned Sub-Divisional Magistrate, Baroda

passed under sec.133 of the Code of Criminal Procedure.

2. Party-in-person namely the revisionist, Shri KC Shah, learned APP and Shri Pravin Gondaliya on behalf of Shri YS Lakhani for respondent no.1 have been heard. None appeared on behalf of respondent no.2 despite service of notice.

3. The revisionist had purchased a flat on the ground floor of Shubh Apartments, 51-Vishwaas Colony, behind National Plaza, Alkapuri, Baroda. When he purchased the flat there was no provision of electricity, nor for supply of water and no electric motor was installed for lifting water to supply it to other flats in the complex. Subsequently, the builder installed water pump run by electricity for lifting water so as to make it reach to other flats in the complex. In this process, the electric motor used to be operated by various occupants of different flats according to their convenience at various times causing nuisance to the revisionist/party-in-person. He is suffering from ailment so also his wife. Apprehending nuisance to himself and his wife, the revisionist approached the learned Executive Magistrate with an application under sec.133 of the Code of Criminal Procedure for removal of this nuisance.

4. It seems that the Sub-Divisional Magistrate, acting upon the application of the revisionist, issued a show-cause notice, the translation of which is undated. In this notice, the learned Sub-Divisional Magistrate wanted to know from the opposite party concerned on May 4, 1998 regarding allegations made in the application of the revisionist. Respondent no.1 appeared and filed objection. Thereafter, an order was passed on July 20, 1998 wherein, the learned Sub-Divisional Magistrate directed that the respondent should remove the electric motor installed below the flat to eliminate noise pollution and electric motor pump should be shifted and installed within the premises so that it causes no noise pollution.

5. Feeling aggrieved, a revision was preferred by respondent no.1. The revisional Court, through the impugned order, allowed the revision and set-aside the order of the learned Sub-Divisional Magistrate. Hence, this revision by the party-in-person.

6. Before appreciating the impugned order as well as the order of the learned Sub-Divisional Magistrate, the provisions of sec.133 of the Code of Criminal Procedure

should be recapitulated. Shri Gondaliya as well as Shri KC Shah argued that jurisdiction under sec.133 of the Criminal Procedure Code can be exercised by the learned Executive Magistrate only in respect of public nuisance and not in respect of private nuisance. According to them, if it is a case of private nuisance namely if the act of someone else causes nuisance to the revisionist then he should have approached the competent Civil Court for redressal of his grievance regarding private nuisance and not that action can be taken under sec.133 of the Code of Criminal Procedure. Further, it was argued that if no action could be taken by the learned Executive Magistrate for removal of private nuisance under sec.133 of the Criminal Procedure order, the order passed by the learned Executive Magistrate becomes without jurisdiction. Hence, it was rightly set-aside by the revisional Court. Section 133 of the Code of Criminal Procedure provides that, "Whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving a report of a Police Officer or other information, and on taking such evidence (if any) as he thinks fit, considers, interalia that, any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public, such Magistrate may make a conditional order requiring the person causing such nuisance to remove such nuisance within a time fixed in that behalf, and if the person against whom such order is made, appears and objects so to do or to appear before the Executive Magistrate, show cause-notice is required to be issued and the order should not be made absolute. If, however, such person appears in response to the show-cause notice and makes denial of existence of public right over the place or creation of nuisance over a public place then the Executive Magistrate is bound to proceed under sec.137 of the Code of Criminal Procedure. The Executive Magistrate shall enquire into denial of existence of public right or creating nuisance at public place. If, in the course of such inquiry the Magistrate finds that there is reliable evidence in support of such denial he shall stay the proceedings until the matter of existence of such right has been decided by a competent Court. And, if he finds that there is no such evidence he shall proceed, as laid down under sec.138 of the Code of Criminal Procedure.

7. It is obvious that the respondent no.1 appeared before the Executive Magistrate and denied that it was a case of public nuisance. In case of such denial, the Executive Magistrate was required to enquire into the

matter about the existence of right in the nature of public nuisance or private nuisance. And, if in such inquiry the Executive Magistrate found that there was some reliable evidence, on such denial he was bound to stay the proceedings and he was further bound to direct the complainant or the parties to approach competent Civil Court for adjudication of their rights. If, on the other hand, he found that there was no reliable denial evidence then he should have proceeded under sec.138 of the Code of Criminal Procedure and then only, the conditional order which was passed under sec.133(1) of the Code of Criminal Procedure could be made absolute.

8. It appears from the impugned order of the learned Executive Magistrate that this procedure was not followed. What is called as conditional order was never passed by the Executive Magistrate. He simply issued show-cause notice without passing any conditional order. If there was no conditional order, in the eyes of law it could not be made absolute by the Executive Magistrate simply for the convenience of the revisionist.

9. In this view of the matter, the order dated July 20, 1998 of the learned Sub-Divisional Magistrate, Baroda cannot be sustained, and if it was set-aside by the revisional Court it committed no illegality.

10. The party-in-person namely the revisionist argued that the order of the learned Sub-Divisional Magistrate, Baroda dated July 20, 1998 is not for total removal of electric motor but, for shifting of motor and installing the same at such place which may not cause noise pollution to the revisionist. No doubt, the interpretation of the order dated July 20, 1998 as suggested by the revisionist could be accepted but, the question is whether such direction can be given by the Executive Magistrate either in the conditional order or at the time of making conditional order absolute. For this, the Executive Magistrate should have kept in mind that unless the nuisance was created at a public place no such direction could be given. There may be instances where nuisance is created at a public place but, members or persons belonging to the public may not come forward to move an application under sec.133 of the Code of Criminal Procedure. In such situation, even one person who is aggrieved from such public nuisance at a public place may report the matter to the Executive Magistrate, and upon such information the Executive Magistrate can proceed under sec.133(1) of the Criminal Procedure Code. Section 133(1) of the Code of Criminal Procedure provides that, "The Executive Magistrate can proceed under this

section on receiving the report of Police Officer or other information." The word "other information" includes information given by any person who is aggrieved from public nuisance. So, what is provided under sec.133 is that nuisance should be created at a public place. Public place is defined in explanation to sub-section (2) of sec.133. It says that, "A public place includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes." The complex where the electric motor was installed is not a public place, either within the definition of explanation of public place as contained in sub-section (2) of sec.133 of the Code of Criminal Procedure, nor it can be said to be a public place which is understood by an ordinary prudent man. The complex is not a place which is acceptable to public at large. There only the occupants of the flat, their relatives, friends and companions are entitled to enter the complex. Consequently, the place where the electric motor is installed is not a public place. Assuming that the running of electric motor at odd hours or during 24 hours causes nuisance to the revisionist it cannot be said that the nuisance is being created at a public place. If this is so, the jurisdiction by the Magistrate under sec.133 of the Code of Criminal Procedure was wrongly exercised.

11. It may further be mentioned that since the respondent no.1 of this revision had denied existence of public nuisance, the proper course for the Executive Magistrate was to proceed under sec.137 of the Code of Criminal Procedure, and, if he found that there was some reliable evidence in denial of existence of public nuisance he should have stayed the proceedings and directed the parties to get their rights decided from the competent Civil Court. If, on the other hand, the Executive Magistrate found that there was no reliable denial evidence he could have proceeded further as provided under sec.138 of the Code of Criminal Procedure. This provision was also not complied with by the learned Executive Magistrate. On the other hand, he straightaway made the so-called conditional order absolute through the impugned order, which was subject matter of the revision before the lower Court.

12. It also emerges from the record as well as from the impugned judgment that, the revisionist has filed Civil Suit No.1594/97 in respect of same right and sought injunction restraining the respondent from creating noise pollution. The learned Additional Sessions Judge has mentioned in the impugned judgment that no stay order or injunction order was passed by the Civil Court.

Consequently, it can be said that the revisionist himself considered that the dispute raised by him was of civil nature, and for getting relief he approached the Civil Court but, without success. If the dispute is of civil nature then such dispute could not be entertained by the Executive Magistrate under sec.133 of the Code of Criminal Procedure. Provisions of sec.133 of the Criminal Procedure Code cannot be used for settlement of disputes between the private parties. Such provisions can be used only for settlement of dispute in relation to public right in the general interest of the public at large. If the dispute affects one individual but not the public at large, the jurisdiction under sec.133 of the Code of Criminal Procedure could not be exercised. It may also be mentioned that, in this case number of persons have occupied other flats in the complex but, they are not feeling inconvenience due to running of electric motor or the electric pump. Consequently, it cannot be said that it was a case where nuisance was created at a public place, where public at large was affected or the residents at large of the complex were affected. Hence also, jurisdiction under sec.133 of the Criminal Procedure Code was wrongly exercised by the learned Executive Magistrate.

13. For the reasons stated above, I am of the view that the order of the Executive Magistrate was patently illegal and beyond his jurisdiction hence, it was liable to be set-aside and was rightly set-aside by the revisional Court namely 3rd Additional Sessions Judge, Baroda. I, therefore, do not find any substance in this revision, which is hereby dismissed.

September 19, 2000. (D.C. Srivastava, J.)

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